COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1107

COMMONWEALTH

vs.

ALAN C. SMITH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Alan C. Smith, the defendant, was convicted of operating a motor vehicle while under the influence of alcohol, second offense, under G. L. c. 90, § 24 (1) (a) (1). He argues on appeal that a new trial is warranted because prior bad acts evidence was wrongfully admitted through a booking video and the judge declined to give a curative jury instruction. We affirm.

Background. We summarize the facts as the jury could have found them. On December 16, 2016, the Leominster Police Department received a 911 call from a woman on Route 12 reporting a dangerous driver whose car "nicked" the passenger-side mirror on her vehicle.[1] The car was driving fast, weaving through traffic and cutting off other drivers. She provided a description of the car and the license plate number to the

[1] The woman testified that no damage was observed to her mirror.

police. She told the 911 operator that the vehicle turned onto Erdman Way.

Officer DeLuca of the Leominster Police Department was dispatched to the area of Erdman Way to investigate. He found a vehicle that matched the given description and license plate number in the parking lot of a hotel "right off" of Erdman Way. DeLuca illuminated the car with his cruiser's spotlight and approached on foot. The defendant, seated in the driver's seat, was "rummaging" through the vehicle. DeLuca yelled out for the defendant's attention, and when the defendant did not respond, he yelled louder, finally getting the defendant's attention.

DeLuca instructed the defendant to roll down his window, but instead the defendant opened the car door. At that point, DeLuca immediately detected a "strong" odor of alcohol emanating from the vehicle. DeLuca asked the defendant how he was doing, to which he responded, "Huh?" The defendant was next instructed to turn the car off and exit the vehicle. As the defendant did so, he appeared "disheveled," "unsteady on his feet," and "almost fell over as soon as he got out of the car." At one point, he held onto his car in order to keep his balance and remain standing. The defendant's eyes were bloodshot and glassy, and his speech was slurred and difficult to understand. He informed the officer that he had come from a party and said, repeatedly, that he had a hotel room within the hotel.

At this point, DeLuca formed the opinion that the defendant was highly intoxicated and placed him under arrest. As he did so, the officer realized he was standing in a "pool of steaming liquid."[2] The defendant was transported back to the Leominster Police Department for booking. During the booking process, the defendant appeared very intoxicated.

The defendant's jury trial took place on December 19, 2017. Prior to trial, defense counsel and the Commonwealth stipulated to the introduction of the defendant's booking video and the video was played in front of the jury without objection.[3]

Later in the trial, after the Commonwealth had rested and the jury were excused, the judge asked the attorneys to approach the bench. She was concerned that ancillary officers depicted in the foreground of the booking video could be heard discussing a criminal record.[4] After a discussion that is obscured by inaudible portions of the transcript, the attorneys agreed to watch the booking video a second time.[5] With the defendant's

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[2] The defendant told Officer DeLuca that he had "pissed."

[3] We have also viewed a copy of the booking video.

[4] The judge stated, "And in the beginning portion of the video, they're talking about a criminal record. Are they talking about [the defendant's] criminal record or --"

[5] As the judge put it, "No, actually I'd like to hear it again because, if we can hear it specifically -- the three of us -- I might need to give [the jury] a limiting instruction. I just want to make sure, number one, if we can agree that they're not talking about [the defendant], we can tell [the jury] that. If they are talking him, then I don't know what we want to do about

criminal record before her, the judge confirmed that the officers had been talking about a criminal record "consistent" with the defendant's. The officers in the video never mentioned the defendant's name and the crimes discussed were unrelated to operating a motor vehicle while under the influence of alcohol.

Because the judge had reservations regarding whether the jury would have noticed the discussion at all, she ordered the Commonwealth to silence that portion of the booking video during future viewings.[6] After lengthy discussions with the Commonwealth and defense counsel, she determined that no curative instruction was necessary.[7] The defendant was found guilty.

Discussion. On appeal, the defendant argues that the admittance of "bad acts evidence" contained within the booking video, and the judge's failure to provide a curative instruction, warrant a new trial. We disagree. Because the error was unpreserved, we review for a substantial risk of a

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it because it definitely shouldn't go in with the jury if they're talking about his --"

[6] The judge found that the viewer's attention was naturally drawn to Officer DeLuca and the defendant and "not [to] what ancillary officers are doing."

[7] We note that the judge raised the possibility of giving a curative instruction three separate times.

miscarriage of justice.[8] See Commonwealth v. Collins, 92 Mass. App. Ct. 395, 400 (2017).

"Evidence of a defendant's prior or subsequent bad acts is inadmissible for the purpose of demonstrating the defendant's bad character or propensity to commit the crimes charged." Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). Such evidence is inadmissible if "its probative value is outweighed by the risk of unfair prejudice to the defendant." Id. A trial judge retains broad discretion over any instructions given to the jury. Commonwealth v. MacDonald, 371 Mass. 600, 603 (1976).

Here, there can be no question that the contested portion of the video should not have gone before the jury. See Crayton, 470 Mass. at 249. However, on this record we cannot conclude that the circumstances created a substantial risk of miscarriage of justice. Both parties stipulated to the tape's admission, and we can assume that defense counsel viewed the video before doing so. See Commonwealth v. Miller, 475 Mass. 212, 226 (2016). And as mentioned above no objection was raised when the video was played for the jury. The judge, not defense counsel,

[8] The defendant argues that his objection was preserved in the record. While the transcript shows that the judge noted an objection for the record, we agree with the Commonwealth that inaudible portions of the transcript obscure the specifics of the objection, and we decline to speculate as to what specific objection was raised. The defendant carries the burden of perfecting the record and failed to do so here. See Commonwealth v. Woody, 429 Mass. 95, 97 (1999).

identified the issue.[9] Even if we assume that the jury heard the conversation, the conversation made no mention of the defendant's name and, as stated supra, related to crimes which had no bearing on the charged offense of operating a motor vehicle while under the influence. To the unknowing ear, there would be no way to know that the crimes discussed were "consistent" with or pertained to the defendant's record.

In any event, in light of the strength of the Commonwealth's case, we are confident that this error did not likely influence the jury's verdict. Contrast Commonwealth v. Little, 453 Mass. 766, 775 (2009). As such, there was no substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Rubin, Desmond & Ditkoff, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: July 22, 2019.

[9] It was not until the judge had the defendant's criminal record before her that she knew the discussion was "consistent" with his record.

[10] The panelists are listed in order of seniority.